IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9054 of 2004

HON'BLE MR.JUSTICE K.S.JHAVERI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

HAMBURG BULK CARRIERS GMBH FOREIGN COMPANY

Versus

VISHAL EXPORTS OVERSEAS LTD

Appearance:

MR AS VAKIL for Petitioner No. 1

MR SUNIT S SHAH for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE K.S.JHAVERI

Date of decision: 03/11/2004

ORAL JUDGEMENT

1.0 Rule. Mr. Sunit Shah waives service of rule for the respondents.

1.1 In this petition the petitioner has challenged the judgement and order dated 16th April 2004 passed by the Judge, Court No.19, City Civil Court, Ahmedabad, ("trial court" for short) below Exh.9 in Civil Miscellaneous Application No.628 of 2002 by which the

trial court has dismissed the preliminary objection of the petitioner to the effect that the trial court is not the Court as defined and understood under Section 2(1)(e) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act) and consequently, the trial court has no jurisdiction to try and decide the Civil Misc. Application.

2.0 In order to appreciate the controversy involved in the present petition it is necessary to note the relevant facts which are as under:

2.1 The petitioner company is carrying on business as ship owners/ship operations and the respondent company is engaged mainly in the business of export of foodgrains.

2.2 Under Charter party dated 23.3.2001 the respondent chartered vessel M.T. ALEGRE 1 (for short "the vessel") owned by the petitioner for carriage of about 20,000 M.Ts of wheat in bulk to be loaded on the vessel at the port of Mumbai for discharge at the port of Umm Qasr, Iraq. Under the said charter party the respondent was described as Charterer/shipper and the petitioner was described as the owner of the vessel. According to the petitioner the said Charter party states the place and the date on which it has been made and the said place and date are "New Delhi, 23.3.2001". Clause 39 provides that all disputes arising under the said Charter Party shall be settled in India in accordance with the provisions of the Arbitration Act or any further amendments thereof and under the Maritime and Arbitration Rules of the Indian Council of Arbitration.

2.3 After the contract was entered into at New Delhi on 23.3.2001 (Annexure-B to the petition) and prior to its being formally signed by the respondent the said charter party was already acted upon inasmuch as the respondent had commenced loading cargo on the vessel at Mumbai on 30.3.2001 and completed loading on 18.4.2001 and made payment of freight.

2.4 The Ministry of Surface Transport thereafter forwarded the Charter party to the respondent by its letter dated 4.5.2001 (Annexure-D to the petition). A reminder dated 24.5.2001 (Annexure-E to the petition) was also sent reminding the respondent to expedite signing of the charter party. In the meanwhile disputes arose between the parties and the parties therefore agreed to refer the same to arbitration on 3rd May 2001. According to the petitioner Charter party was formally signed by the respondent after 24th May 2001 at Ahmedabad after the

contract had been acted upon, partly performed and payment of freight made by the respondent to the petitioner.

2.5 There was dispute in the nature/condition of cargo loaded on the vessel and therefore the Master of the Vessel was not willing to misrepresent the condition of the cargo. The Master of the Vessel was only willing to issue a "claused" Bill of Lading and therefore it was upto the respondent to provide the Port with a Letter of Indemnity that if required and the detention of the vessel was to the account of the respondent. Ultimately the respondent agreed to provide appropriate Letter of Indemnity indemnifying the petitioner in respect of any cargo claims under the Bills of Lading if the cargo was rejected by the receivers at the Port of discharge. The said Letter of Indemnity dated 3.5.2001 (Annexure-F to the petition) was executed by the respondent in favour of the petitioner at Mumbai and provided for disputes to be referred to arbitration at Mumbai under the Arbitration Act.

2.6 Since the refusal to accept claused mate's receipts had led to substantial detention of the vessel at the Port of Mumbai and for other reasons the petitioner and the respondent entered into an agreement dated 3.5.2001 (Annexure-G to the petition). The said agreement was also executed at Mumbai.

2.7 The vessel, upon completion of loading, proceeded to the Port of discharge i.e. Umm Qasr in Iraq and arrived there on 13.5.2001 at 14.00 hours local time. However, discharge did not commence and lay time also expired. The respondent was not in a position to discharge the cargo at Umm Qasr as the cargo was rejected by the receivers. The respondent, therefore, requested the petitioner to proceed to the port of Jebel Ali (United Arab Emirates) for discharge of Cargo. Accordingly, an Addendum No.1 dated New Delhi 29.5.2001 was executed between the petitioner and the respondent recording that the Port of discharge has been changed from Port of Umm Qasr to the Port of Jebel Ali.

2.8 Since disputes arose between the petitioner and the respondent, the same were referred to arbitration at Mumbai in terms of the documents. The Arbitral Tribunal, by majority award dated 30.8.2002, awarded the entire amount of US $ 2,10,499.18 with interest at the rate of 10% per annum from 4.7.2001 till the date of the award i.e. 30.08.2002 and thereafter at 15% per annum, until payment, legal costs of Rs.2,50,000/- and the

Arbitrators' Fees of Rs.2,85,000/- and another amount of Rs.18,000/- as the Arbitration Venue, hire and incidentals. By the said majority award, the respondent's counter claim was dismissed.

2.9 Feeling aggrieved by the Award dated 30.8.2002, the respondent filed Civil Misc. Application before the trial court praying to set aside the said award. The respondent had also filed an application for interim stay against the execution of the Award.

2.10 The petitioner appeared in the trial court and filed its affidavit in reply/preliminary objection dated 25.2.2003 (Exh.9 at Annexure H to the petition). the respondent has filed its reply dated 6.12.2003 and rejoinder was filed by the petitioner. The trial court, after hearing the parties, by judgement and order dated 16.4.2004 (Annexure-A to the petition), held that the Charter party dated 23.3.2001 (Ammexure-B to the petition) was signed at Ahmedabad by the respondent and that the trial Court has jurisdiction to try and decide the Civil Misc. Application. The trial court has accordingly ordered the Civil Misc. Appeal to proceed further.

2.11 It is against the aforesaid judgement and order the present petition has been filed.

3.0 Learned counsel for the petitioner submitted that in a suit filed for breach of contract the cause of action would arise where the contract was made or where it was to be performed. In the present case both the parties have expressly agreed that the place of making of the contract is New Delhi as stated in the contract and the place of performance of the contract is Mumbai and Umm Qasr, Iraq.

3.1 According to the learned counsel for the petitioner the place where the formal contract document was signed by one of the parties is of no relevance especially when the place of making of the contract has been agreed and especially when the contract has been acted upon by both parties and substantially performed and payments made and disputes arisen, even prior to the formal signing of the contract document.

3.2 He further submitted that the contract document was signed several months later by the respondent at Ahmedabad which was of ministerial in nature and some correspondence was addressed to the respondent-plaintiff at Ahmedabad of which is of no consequence and cannot

confer jurisdiction on the trial court.

4.0 Learned counsel for the petitioner submitted that once the place of making of the contract is expressly agreed by parties or their agents, the place where one of the parties signs the document is not relevant for the purpose of execution of document and it cannot be said that the place where the contract was signed is the place where the contract was made.

4.1 According to the petitioner the contract was in fact negotiated and concluded at New Delhi between the Ministry of surface Transport, New Delhi and the petitioner's brokers Interocean Shipping Co. Pvt. Ltd., New Delhi and consequently the parties agreed New Delhi as the place of making of the contract.

4.2 Learned Counsel for the respondent submitted that the order passed by the trial court is just and proper and the Court has not committed any illegality or jurisdictional error.

4.3 He submitted that the registered office of the respondent-plaintiff is situated at Ahmedabad and therefore the trial court has jurisdiction to entertain the application. He further submitted that all the correspondence made by mail, courier or fax have been made and received by them at their office at Ahmedabad and all the negotiations with regard to the main contract for selling of the wheat and hire of ship have been made by the respondent from Ahmedabad. According to him the cargo of wheat was dispatched for shipment by the instructions given from Ahmedabad and payment for the wheat was also made from Ahmedabad office.

4.4 He further submitted that in any case a part of the cause of action can be said to have arisen within the territorial jurisdiction of the trial court. The further case of the respondent that the vessel was booked by recommendation of the Ministry of Surface Transport by its letter dated 4.6.2001, which was received at Ahmedabad which is a base wherefrom the contract with the shipper was arrived at. He further submitted that the charter party agreement was also signed at Ahmedabad. Thus, according to him the trial court is competent having territorial jurisdiction to decide the application.

5.0 In order to decide the controversy involved in the matter it would be relevant to note section 20 of the Arbitration and Conciliation Act, 1996, which provides

for place of arbitration. The said section reads as under:

> 20. Place of arbitration
>
> (1) The parties are free to agree on the place of arbitration.
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> (2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.
>
> (3) Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties or for inspection of documents, goods or other property.

6.0 A perusal of the document at Annexure-B (copy of the Charter party dated 23.3.2001) shows that the loading place is at Mumbai Port and discharging port is Umm Qasr. Therefore it is clear that the charter party dated 23.3.2001 was executed at New Delhi as indicated in Part 1, paragraph 2 thereof.

6.1 The communication dated 4th May 2001 at Annexure-D is a letter addressed to the respondent by the Ministry of surface transport, New Delhi requesting to sign charter party dated 23.3.2001 by indicating name/designation of signatory and return both originals to them for further necessary action. Therefore, the same has also been executed at New Delhi.

6.2 The communication dated 24.5.2001 at Annexure-E to the petition is from Ministry of Surface Transport to Vishal Exports, Ahmedabad requesting for signing up the Charter Party. Admittedly this was also executed at New Delhi.

6.3 The Letter of Indemnity dated 3.5.2001 indicates that the same was executed at Mumbai on the said date. Even the said letter of Indemnity is attested before the Notary at Mumbai. Further the agreement dated 3.5.2001 specifically states that the same has been made at Mumbai. The Addendum No.1 dated 29.5.2001 to the charter party dated 23.3.2001 was executed at New Delhi.

6.4 A perusal of the aforesaid documents shows that the same were executed either at Mumbai or at New Delhi. The Ministry of Surface Transport, had forwarded the charter party to the respondent by letter dated 4th May 2001 for signature. The respondent may have signed the formal contract at Ahmedabad, but, in my opinion, the same is irrelevant. The contract was entered into at New Delhi on 23rd March 2001 and the contract was already acted upon prior to the formal signing thereof and the vessel had commenced loading at Mumbai on 30th March 2001 i.e. even prior to the date on which the contract was sent by the Ministry of Surface Transport to the respondent at Ahmedabad. Therefore I do not find any substance in the contention that the contract was signed at Ahmedabad.

7.0 After considering the above facts and circumstances I am of the opinion that no part of the cause of action which calls for Arbitration or filing of suit has arisen within the jurisdiction of the trial court. None of the part of contract was required to be performed/discharged within the territorial jurisdiction of the trial court. It is also required to be noted that the Arbitration proceedings were also held at Mumbai. The trial court cannot have jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of the suit.

7.1 In my view, the territorial jurisdiction of the court is to be decided on the basis of what is pleaded in the application. It is on record that the contract was entered into at New Delhi by the respondent and the Ministry of Surface Transport, New Delhi. The disputes between the parties pertain to the loading of cargo by the respondent on board the petitioner's vessel at the port of Mumbai and discharge of the cargo in Iraq and in U.A.E. Therefore, no cause of action has arisen within the territorial limits of the trial court.

7.2 There is no dispute that the Letter of Indemnity dated 3.5.2001 was executed by the respondent in favour of the petitioner at Mumbai and provided for disputes to be referred to arbitration at Mumbai under the Arbitration Act. There is also no dispute that the arbitration proceedings were filed at Mumbai. The Ministry of Surface Transport had forwarded the Charter Party to the respondent and the respondent signed the same at Ahmedabad. In fact the contract was concluded at New Delhi on 23.3.2001 and was valid, binding and enforceable as on that date irrespective of whether the formal contract was signed or not. There is also no

dispute that the parties had acted on the contract and performed the same even before the contract document was formally signed. Therefore, merely because the said document was subsequently signed at Ahmedabad will not assist the respondent in stating that the trial court has jurisdiction to entertain the application.

8.0 Learned counsel for the petitioner has relied upon a decision of the Supreme Court in the case of A.B.C. Laminart Pvt. Ltd. Vs. A.P. Agencies, reported in AIR 1989 SC 1239 [(1989)2 SCC 163 = 1989(1) SCR 1 = 1989 JT 38 = 1989(1) SCALE 633 = 1989(2) UJ 80 = 1989(2) Arb. LR 340]. The relevant paragraphs of the said decision read as under:

"13. Under section 29(c) of the Code of Civil Procedure subject to the limitation stated therefore, every suit shall be instituted in a court within the local limits of whose jurisdiction the cause of action, wholly or in part arises. It may be remembered that earlier Section 7 of the Act 7 of 1888 added Explanation III as under:

Explanation III - In suits arising out of contract the cause of action arises within the meaning of this section at any of the following places, namely:

(1) the place where the contract was made;

(2) the place where the contract was to be performed or performance thereof completed;

(3) the place where the performance of the contract any money to which the suit relates was expressly or impliedly payable.

14. The above Explanation III has now been omitted but nevertheless it may serve as a guide. There must be a connecting factor.

15. In the matter of a contract there may arise causes of action of various kinds. In a suit for damages for breach of contract the cause of action consists of the making of the contract, and of its breach, so that the suit may be filed either at the place where the contract was made or at the place where it should have been

> performed and the breach occurred. The making of the contract is part of the cause of action. A suit on a contract, therefore, can be filed at the place where it was made. The determination of the place where the contract was made is part of the law of contract. But making of an offer on a particular place does not form cause of action in a suit for damages for breach of contract. Ordinarily, acceptance of an offer and its intimation result in a contract and hence a suit can be filed in a court within whose jurisdiction the acceptance was communicated. The performance of a contract is part of cause of action and a suit in respect of the breach can always be filed at the place where the contract should have been performed or its performance completed. If the contract is to be performed at the place where it is made, the suit on the contract is to be filed there and nowhere else. In suits for agency actions the cause of action arises at the place where the contract of agency was made or the place where actions are to be rendered and payment is to be made by the agent. Part of cause of action arises where money is expressly or impliedly payable under a contract. In cases of repudiation of a contract, the place where repudiation is received is the place where the suit would lie. If a contract is pleaded as part of the cause of action giving jurisdiction to the court where the suit is filed and that contract is found to be invalid, such part of cause of action disappears. The above are some of the connecting factors.

8.2 It is by now a settled law that an action can lie for breach of contract at the place where the contract has been entered into or the place where the contract is to be performed. A cause of action in respect of breach of contract can be deemed to have arisen only at the aforesaid premises. It is only where the parties have not agreed on the place where the contract has been entered into, would be the issue of acceptance of the officer and communication of the acceptance and place of signature, be relevant.

8.3 It is required to be noted that in international commercial contracts where one of the parties resides outside India and contracts are often concluded by exchange of fax, etc., the place of making of the contract assumes importance. It is for this reason that

the parties often provide that the contract shall be deemed to be made at a particular place so that there is no ambiguity or dispute regarding the place of making it and no investigation is required to be done into the place of making the contract. On the facts of the present case the parties have expressly agreed that the place of making of the contract is New Delhi. Even the charter party contract was arrived at New Delhi between brokers of the petitioner and the Ministry of Surface Transport, New Delhi, acting on behalf of the Respondent. This is evident from the fixture note which is produced at page 36 of the petition. As is evident, the contract document was formally signed almost two months later by the respondent at Ahmedabad and it cannot have any relevance especially when the contract was in fact acted upon by the parties and performance commenced and payments under the contract were made by the respondent much prior to the formal signing of the contract by the respondent at Ahmedabad.

8.4 On a perusal of the impugned judgement, I am of the clear opinion that the trial court has committed an error in holding that if one party signs an agreement at one place and the other party at a different place, both places have territorial jurisdiction to decide any issue between the parties. This proposition is contrary to the law laid down by the Supreme Court in the case of ABC Laminart (supra) and contrary to the settled legal position that an action for breach of contract can lie at the place where the contract has been entered into and if that place has been agreed by the parties then the place where one of the parties may have formally signed the contract is irrelevant. In fact the formal signature was not necessary in view of the fact that the contract had already been acted upon and performed prior to it being formally signed. In any case, from the record it is clear that the contract was entered into at New Delhi which is expressly stated and evident from the fixture note. The contract was performed at Mumbai and in Iraq and U.A.E. Therefore, neither was the contract entered into at Ahmedabad nor was it performed at Ahmedabad.

8.5 Therefore, in my opinion the trial court has committed an error in holding that the Civil Court at Ahmedabad is competent Court to deal with and decide the arbitration petition and consequently rejecting the application Exh.16. Therefore the present petition is required to be allowed.

9.0 Accordingly the petition is allowed. The judgement and order dated 16th April 2004 passed by the

Judge, Court No.19, City Civil Court, Ahmedabad, below Exh.9 in Civil Misc. Application No.628/2002 is quashed and set aside and the Application Exh.9 is allowed. Consequently the trial court may return the plaint to the party for presentation of the same before the appropriate court. Rule is made absolute accordingly with no order as to costs.

[K.S. JHAVERI, J.]

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